the 8 day of October, 03
TESTE: LILLIE M. HART, CLERK 3:50pm
By _____ D.C.

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA,	)	
v.	)	Criminal No.
	)	The Hon. Jane Marum Roush
LEE BOYD MALVO,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO PRECLUDE DEATH SENTENCE BASED UPON "TERRORISM STATUTE"

COMES NOW, the Defendant, Lee Boyd Malvo, by and through counsel, and in support of his Motion to Preclude Death Sentence Based Upon Terrorism Statute, hereby states the following:

Section 18.2-31(13) renders capital the "willful, deliberate and premeditated killing of any person by another in the commission of or attempted commission of an act of terrorism as defined in Section 18.2-46.4." "[A]ct of terrorism" is defined as "an act of violence defined in clause (i) of subdivision A of Section 19.2-297.1 committed with the intent to (i) intimidate the civilian population at large; or (ii) influence the conduct or activities of the government of the United States, a state or locality through intimidation." Section 19.2-297.1 includes in its list of offenses first degree murder. Under Code of Virginia Section 18.2-46.5, anyone who commits or conspires to commit, or aids and abets the commission of an act of terrorism is guilty of a Class 2 felony if the base offense of the act of terrorism may be punished by life imprisonment.

There is a clear conflict between § 18.2-31(13) and § 18.2-46.5. The former imposes capital punishment on the same offense for which the latter imposes a maximum penalty of life

imprisonment. There is no discernable distinction between murder committed under § 18.2-31(13) and murder committed under §18.2-46.5. Both statutes require proof of identical elements and are defined by the same terms.

Where two statutes govern the same behavior, yet one imposes a harsher penalty, the law requires that the more lenient statute be applied. Here, that would require application of § 18.2 46.5 which carries a life sentence at its maximum. This result is mandated by the due process and equal protection clauses of the Fifth and Fourteenth Amendment, the progeny of which is the "rule of lenity" which states that "[a]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" Bell v.United States, 349 U.S. 81, 83 (1955). The courts of The Commonwealth have adopted the doctrine, holding that "any ambiguity or reasonable doubt" as to the meaning of a penal statute "must be resolved" in the defendant's favor, see Ansell v. Commonwealth, 219 Va. 759 (1979) and that "[w]here the application of the criminal law is at issue, any ambiguity shall be resolved against the Commonwealth and in favor of the accused." Richardson v. Commonwealth, 25 Va. App. 491 (1997). Nowhere in the federal law or the law of the Commonwealth is this concept limited in application to ambiguities *within* statutes, and it would be counterintuitive to posit that ambiguity *between* statutes, such as in the case at bar, should not be treated in the same manner.

The courts of other states have addressed the issue of same conduct/different punishment -- never, however, in the context of capital punishment vs. non-capital punishment -- and have elected to apply the more lenient statute. Of course, any other result would be counterintuitive, but the decisions of our fellow states do provide guidance. In the first example, City of Seattle v. Hogan, 766 P.2d 1134 (Washington App. 1989), the state and municipal codes contained identical provisions. The latter provided for a maximum penalty of 90 days in jail and/or a fine

of $1,000.00. The former provided for up to one year in jail and a fine of $5,000.00. The Washington Court agreed with Mr. Hogan, that prosecuting him and punishing him under the municipal law -- with the harsher penalty -- violated Equal Protection.

Likewise, in Illinois, a defendant was prosecuted for an offense carrying a potential punishment of 6 to 30 years imprisonment. See, Illinois v. Christy, 564 N.E. 2d 770 (1990). There was an identical offense in the code, carrying a maximum of 15 years imprisonment. The court found it illogical that the same offense could carry two different penalties and that this violated a provision of the Illinois constitution requiring proportionality in sentencing. See, id. at 774. Proportionality in sentencing is a concept arising from the Equal Protection Clause, however, common to all states under the federal Constitution.

While Virginia has not yet addressed this issue *on point*, and no jurisdiction has faced the decision between two identical offenses carrying life or death, there has been some discussion of the same offenses having dissimilar outcomes both in Virginia and the United States Supreme Court. The Supreme Court has faced a similar decision in consideration of two overlapping federal gun statutes carrying two different sentences. See United States v. Batchelder, 442 U.S. 114 (1979). The Supreme Court, unlike Illinois and Washington, found that the prosecution was free to proceed under either statute at it's discretion. See id. at 123-24. The statutes at issue in Batchelder were 18 U.S.C. 922(h) and 1202(a), which both prohibit convicted felons from obtaining firearms. Violation of the former is sentenced pursuant to 18 U.S.C. 924(a) (mandatory five years) while the latter calls for a two-year maximum. Unlike the statutes in the instant matter, the federal statutes did not contain identical language nor identical elements. The Supreme Court noted only a "partial redundancy" between the statutes and found that they "operate[] independently of" one another. See id. At 118. In fact, to support this reasoning, the

Court spent a large portion of the opinion (pp. 118-123) pointing out the differences between the statutes – differences in language, construction, purpose and legislative history.

As to the legislative history, both federal statutes were part of the Omnibus Crime Control and Safe Streets Act of 1968. However, as stated by the Court, it was clear in the legislative history that Congress "intended to enact two independent gun control statutes, each fully enforceable on its own terms." Id. at 119. Title IV, which houses 922(h) and 924(a) was a slight modification and codification of a "carefully constructed package of gun control legislation" which had already been in existence for some time. Id. at 120. Title VII, on the other hand, which houses 1202 was "a "last-minute" floor amendment, "hastily passed, with little discussion, no hearings, and no report."" Id. What legislative history *does* exist however includes a statement by the sponsor, in response to a direct question as to whether Title VII was to substitute for Title IV, that the newer statutes would "take nothing from" but rather "add to" Title IV. Id. House discussions included the statement that Title VII would "complement" Title IV. Id. As the Court stated *"These discussions together with the language and structure of the Omnibus Act,* evince Congress' clear understanding that the two Titles would be applied independently." Id. at 121 (emphasis added).

Va. Code §§ 18.2-31(13) and 18.2-46.5 were *both,* as was 18 U.S.C. 1202, "hastily passed, with little discussions, no hearings and no report." Id. at 119. More importantly, the Virginia statutes were passed simultaneously with the same purpose and as part of the same anti-terror legislative "package." This was *not* the case in Batchelder. In that case, the Supreme Court found it necessary to review legislative history to determine what effect the "partial redundancy" between the statutes should have. Id. at 118. The Court did not simply deem the two statutes independent and their coexistence appropriate, but rather engaged in a piecemeal

examination of the words, coverage and history of each. In its examination the court found different wording and differently definitions ("felony" for example, was defined different in each, id. at 119 n.5) but which did cover the same act. This brought the Court to the legislative history, in which lies the basis for the opinion. See id. at 121.

The statutes at issue herein, Va. Code §§ 18.2-31(13) and 46.5, have *identical phrasing* and identical construction (by their own terms), as well as *the same* -- albeit unrecorded -- history. Given the speed with which this reactionary anti-terror legislation was passed, it is no surprise that there are ambiguities, overlaps and conflicts. However, unlike the Court in Batchelder, this Court cannot turn to, nor assume a legislative history which provides a clear demarcation between these statutes and unequivocal intent to create two separate crimes and penalties. That history does not exist and that intent is not clear. Therefore in *accordance* with Batchelder, this court must resolve the conflict in Defendant's favor.

Virginia has adopted lenity in certain similar circumstances, on a smaller scale of course. For example, as the court is aware, city and town codes cannot impose harsher penalties than the state code. Another example is found in the prosecution "crimes against nature." In Virginia, one who commits sodomy has been guilty of a felony under Va. Code § 18.2-361 (2003). However, one who commits sodomy *for money* is guilty of a misdemeanor. Va. Code § 18.2-346 (2003). The Supreme Court of Virginia has held that by amending the prostitution statute (in 1980) to specifically include sodomy for money, the General Assembly precluded prosecution under the general statutory scheme previously in place, for prosecution and punishment for sodomy. See McFadden v. Commonwealth, 3 Va. App. 226, 228 (1986). The Court held that it was *not* in the Commonwealth's discretion to prosecute under either, because the General Assembly *removed* the commission of crimes against nature (§18.2-361) for money from the

general scheme and made it a specific offense, prostitution, with a specific penalty. Therefore, one[1] who engages in sodomy for remuneration "can be convicted only of a misdemeanor."

In addition, it should not be lost on the court that in the *McFadden* case, although the rationale does not rely *explicitly* on the rule of lenity, the fact that it is the premise underlying the decision is strongly implied. Simply, the more lenient statute *must* apply as there would be no justification in state or federal law for holding otherwise and the opposite result would fly squarely in the face of Equal Protection and justice in general. Surely, without stating as much, the Virginia Court of Appeals provided in *McFadden* a more palatable rationale in a "morals" case for what is truly an issue of lenity and the interpretation of ambiguity in favor of the defendant.

Once again, the problem with the statutes at bar is that they were both passed *at the same time*, in reaction to the attacks of September 11, 2001 – attacks orchestrated and executed by a known, international, terrorist organization. The ambiguity which arises from the differing sentencing possibilities then is not so easily explained as a later statute clarifying, narrowing, encompassing, or otherwise altering the effect of one passed earlier. However, where there is no explanation, no clear answer, the rule of lenity is precisely where the court must look to solve the dilemma, and as stated earlier, the rule falls in favor of the more "lenient" statute, or § 18.2-46.5.

In the case at bar, it is *impossible* to state with certainty which of the statutes was meant to override, supercede or take precedence over the other. Holding that the harsher penalty should prevail would be without foundation, and in fact counterintuitive to well-settled law. Holding that the more lenient penalty must apply is in strict accordance with the rule of lenity.

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[1] Apparently, this "protection" is limited to females, but as the Equal Protection debate arising from the Anti-Sodomy laws is irrelevant to this discussion, the general term is used here.

Finally, in addition to the rule of lenity, Virginia law provides that where a statute conflicts with a more specific statute addressing the same issue, the more specific statute always controls. See Thomas v. Commonwealth, 244 Va. 1 (1992). Va. Code § 18.2-31 is a generalized criminal statue providing a variety of acts which may be prosecuted as capital murder. To the contrary, Va. Code § 18.2-46.5 is a far more specific statute designed to and explicitly worded to deal with "acts of terrorism" and is part of a pointed package of legislation passed for a specific purpose. Accordingly, Thomas too would dictate that § 18.2-46.5 should control.

WHEREFORE, the Defendant respectfully prays that this Honorable Court will preclude the Commonwealth from seeking the Death Penalty pursuant to Va. Code § 18.2-31(13) as it is in direct conflict with § 18.2-46.5, and the rules of lenity and specificity demand that such ambiguity be resolved in favor of the Defendant.

Respectfully Submitted,

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By Counsel

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CERTIFICATE OF SERVICE

We/I hereby certify that a true copy of the foregoing Motion/Memorandum was hand-delivered to:

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and the original was forwarded for filing to:

Hon. John T. Frey
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Hon. Jane Marum Roush
Judge
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this 8th day of October, 2003.

Co-Counsel